No. 2947

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARYLAND CASUALTY COMPANY, a Corporation of the State of Maryland,

Plaintiff in Error,

vs.

PACIFIC COUNTY, a Municipal Corporation, and One of the Counties of the State of Washington, and

J. L. GLAZEBROOK, as County Treasurer of said Pacific County,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, Judge.

Reply Brief of Plaintiff in Error

JOHN W. ROBERTS,
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Press of Pliny L. Allen Co., Seattle

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Counsel (their brief, p. 9) quote Trial Court to the effect that the letter written by Glazebrook does not overcome his sworn statement. This overlooks the fact that the letter states that both the Treasurer and Prosecutor had refused the bond, and Prosecutor *testified under oath* that he had declined it.

Q. "Well, now, Mr. O'Phelan, you stated now, and I presume that is correct, that you have no recollection as to when you did approve it?"

A. "No sir, I could not say definitely when I did approve it."

Q. "But you do remember, however, that when this bond was presented to you, that you objected to the form of it?"

A. "Yes, I have a distinct recollection of that."

Q. "And you at that time declined to approve it because it was different in form from the other depository bonds?"

A. "Yes, if I may explain, that is true." (Tr. p. 55).

> "The clause which Glazebrook insisted must go into the bond is in substance what I stated *must be contained in it. I demanded this for the sake of uniformity in all the bonds.*" (Tr. p. 56).

BOND NOT OFFICIAL

Counsel quote statute (p. 12) and assert (p. 22) that this is an "official bond."

They cite no statute and no decision where statute is similar to that of Washington. No other statute contains the following provision, taken from Sec. 5076 of our Code, and which is not referred to

nor quoted by the trial court or counsel.

> "The provisions of this chapter shall in no way relieve or release the County Treasurer from any liability on his *official bond* as such Treasurer, or any surety upon such bond, and shall in no way affect the duty of the several county treasurers of this state to give the bond as such treasurer now required by law."

The bond runs to "J. L. Glazebrook, Treasurer of Pacific County." It is not Glazebrook as Treasurer of the County, nor to the County. Glazebrook, and his "official bond" are expressly made liable for the money. While, under Kansas and similar statutes, deposit in certain banks is made mandatory and the treasurer is absolutely released when he deposits in the designated bank; and the relation the bank sustains to the county is that of debtor and creditor, the treasurer being absolved.

Under Washington statute, the bank does not become debtor of county. The condition of the bond is that the bank shall keep the money, "Subject at all times to the check and order of 'J. L. Glazebrook, Treasurer'." (Tr. p. 9). The county looks to Glazebrook, and his official bond as treasurer, and not to the bank. There is no privity between the bank and the county. The Treasurer, and not the bank, is the custodian. While, under the Kansas statute, the moment the treasurer deposits the money, the bank becomes custodian and liable directly to the county.

NO MEETING OF MINDS

There was never any meeting of the minds in this transaction, and that is a phase of the matter which counsel shrewdly avoid. In our opening brief we cited the record to show that Prosecuting Attorney, sent his deputy to see Glazebrook after the bank had failed. They found the bond there in the possession of Glazebrook. Both Glazebrook and the Prosecutor not only had failed to accept or approve the bond, but had rejected it, and on the 19th it was still lying in the private office of Glazebrook.

Counsel make much of the contention that Glazebrook could not legally have made deposit without this bond. He could legally make deposits *without any bond,* because his official bond is by the statute made liable for the money. Neither does the statute require him to deposit the money with the designated banks. Such deposit is merely permissive, not mandatory. He can deposit in any bank, or keep it in his own safe. There can be nothing in the contention that $8000 was deposited on account of this bond, especially when the Trial Court refused to permit Glazebrook to answer the question, whether or not he did make this deposit on account of the bond (Tr. p. 34).

"I stated in the letter that the prosecuting at-

torney had refused to approve of the bond. I expected when I wrote this letter that the company would send a new bond." (Glazebrook's testimony, Tr. p. 48).

"I did not file the bond with the clerk because *the Company had not sent me bond carrying the clause outlined.*" (Tr. p. 50)

THERE WAS NO CONTRACT—NO BOND COMPLAINT STATES NO CAUSE OF ACTION

We earnestly urged this in our opening, and Counsel have ignored it.

The action is at law, and plaintiff must stand or fall upon the complaint. The only allegation as to purpose of bond is in Paragraph IV. (Tr. p. 4).

"To secure the sum and amount of the County's moneys and funds *to be deposited* in the said First International Bank."

The sole allegation as to moneys in the bank is: "That on the *19th day* of July there was on deposit $52,497.97," and on the 17th this bank closed and on the 19th the bond was lying in Glazebrook's office. There was no allegation that a single dollar was deposited after any date at which they claim the bond *became effective, or while the bank was open,* and we objected to the introduction of any evidence under the complaint, and when evidence was offered of the

two $4000 deposits, we objected especially (Tr. p. 51) to the introduction of the evidence, and have assigned its receipt as error; and we urge that this court cannot now consider those two deposits for any purpose.

On the point that the bond secured past deposits, Counsel quote copiously *Kephart vs. Buddecke,* 80 Pac. 501. We called attention to that case in our opening, and pointed out that the recitals in that bond expressly referred to moneys already on deposit. Counsel omit the recitals. The decision states that reference must be had to the recitals to determine what money is secured; and when these are consulted we find:

> "That, whereas large sums of money *have accumulated* in the city treasury, which have been so deposited, and which may continue to so accumulate * * *"

In opposition to citation on construction, we quote the following from the Supreme Court of Washington:

> "We have held that compensated sureties would not be heard to invoke the rule of *strictissima juris,* but our holdings have gone no further than to hold that such sureties could not claim the same rule of strict construction available to non-compensated or voluntary sureties or guarantors. When the contract is plain and unambiguous, or when its doubtful terms have been reconciled, whether by the one rule or the

other, this court has, like all others, held the parties to their contract; for as is said in the books, 'a surety is bound by the contract he made, and not by some contract which he did not make, even though the latter may be more favorable to him than the former.' Sureties and guarantors are not to be made liable beyond the express terms of their contract."

James Black Masonry & Contracting Company v. National Surety Company, 61 Wash. 479. (Wrongfully cited in opening brief as 51 Wash. 471).

We likewise direct the attention of the Court on this point and as to the obligation of the bond in such cases, to *Pacific County vs. Illinois Surety Company,* 234 Fed. 97, being the suit of the same plaintiff referred to in the briefs.

The Court, among other things, said:

"A surety company for a consideration is, however, entitled to have its contract interpreted by the ordinary rules of law. *Gilmore & P. R. Co. vs. United States Fidelity & G. Co.,* 208 Fed. 277, 279, 125 C. C. A. 477. And the liability cannot be enlarged beyond the scope of the terms of the contract, and where the language is unambiguous the question of construction does not enter."

The Court held that, giving effect to every part of the contract, it seemed clear that the Illinois Surety Company was released. The Maryland is as clearly so.

They say the letter of the 14th would have gone to Seattle in one day. The evidence is clear and positive that the letter did not reach Seattle until afternoon of 17th (Tr. pp. 57-58), and there is no evidence *when it was mailed.* Letters frequently are delayed in mailing.

They emphasize "Compensated Surety," but neither Glazebrook nor County compensated this surety. If any had been paid it would have been by the bank, not Glazebrook. The bank was attempting to procure a bond at its own expense, and Glazebrook is in no position to raise the question of Compensated Surety.

Why stultify? Why dissemble? An examination of the record must persuade that Glazebrook and O'Phelan never intended to accept the bond. *They had never before accepted such a bond.* After close of bank on 17th, they took stock on 19th and decided to try to hold both Maryland and Illinois Surety, and in neat-handed, fine fingered manner approved and filed the bond.

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